95-339

No. 95-933 (2)

Supreme Court, U.S.
FILED
SEP 22 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

KOREAN AIR LINES CO., LTD.,

Petitioner,

-v.-

BARBARA SWIFT HOLLIE, as the Personal Representative of and Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

AARON J. BRODER
Counsel of Record
F. LEE BAILEY AND AARON J. BRODER
Counsel for Respondent
Barbara Swift Hollie
350 Fifth Avenue - Suite 4710
New York, New York 10118
(212) 244-2000

QUESTION PRESENTED FOR REVIEW

Korean Air Lines ("KAL") has formulated their question presented as follows: "Whether, pursuant to the general maritime law principles of *Gaudet*, and in light of *Higginbotham* and *Miles*, non-pecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA during the course of international air transportation within the meaning of the Warsaw Convention?" Petition at i (footnotes omitted).

We believe the question should be properly formulated as follows: Since the Warsaw Convention[1] allows recovery for "damages sustained," are damages for loss of society recoverable? However, a preliminary question on whether the court should accept *certiorari* is whether in light of the fact that the court has already granted *certiorari* in *Zicherman*, it should also do so in this case which concededly presents the identical question by which this case must be bound in any event.

---

[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C. App. § 502 (1988).

LIST OF THE PARTIES

Respondents

The Respondent is Barbara Swift Hollie, who was the plaintiff-appellee/cross-appellant in the Court of Appeals.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

LIST OF THE PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

A. Some Background of this Twelve Year Old Case 2

B. Statement of the Damage Case 4

1. Application for Certiorari to this Court 4

2. KAL's Refusal, After Twelve Years, to Pay the Undisputed $552,216.00 Final Judgment 5

REASONS FOR DENYING THE WRIT 6

GRANTING ANOTHER WRIT IN LIGHT OF *ZICHERMAN*, WOULD BE A POINTLESS WASTE OF COURT TIME AND AN UNNECESSARY FURTHER DELAY IN THIS TWELVE YEAR OLD CASE WHICH, IN ANY EVENT, IS BOUND BY *ZICHERMAN* 6

RECOVERY FOR LOSS OF SOCIETY IS AVAILABLE IN WRONGFUL DEATH ACTIONS ARISING UNDER THE WARSAW CONVENTION 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Anderson v. Whittaker Corp., 692 F.Supp. 764 (W.D. Mich. 1988), *aff'd in part*, 894 F.2d 804 (6th Cir. 1990) 7

Bickel v. Korean Air Lines Co., (Nos. 93-2144, 93-2206, 93-2259) 3

Bowden v. Korean Airlines Co., 814 F. Supp 592 (E.D. Mich. 1993) (Nos. 94-1096, 94-1098) . . 3, 7

Hollie v. Korean Air Lines Co., 60 F.3d 90 (2d Cir. 1994) 3, 4, 7

In re Air Disaster at Lockerbie Scotland on December 21, 1988, 37 F.3d 804 (2d Cir. 1994),*cert. denied*, 115 S. Ct. 934 (1995) (*"Lockerbie II"*) 7

In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir 1991), *cert. denied*, 502 U.S. 920 (1991) 2, 7

In re Korean Air Lines Disaster of September 1, 1983, 156 F.R.D. 18 (D.C.C. 1994), *aff'd*, 52 F.3d 1122 (D.C. Cir 1995) 2, 3

In re Patton-Tully Transp. Co. v. Ratliff, 797 F.2d 206 (5th Cir. 1986) 7

James v. Korean Air Lines Co., (Nos. 94-1095) 3

Jones v. Korean Air Lines Co., (Nos. 93-2549) 3

Jones v. Korean Air Lines Co., (Nos. 94-110, 94-1101) 3

Kole v. Korean Air Lines Co., (No. 95-1517) 3

Maikovich v. Korean Air Lines Co., (No. 94-5371) 3

Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989) *aff'd* 498 U.S. 19 (1990) 7

Ocampo v. Korean Air Lines Co., (Nos. 94-5323, 94-5424) 3

Oldham v. Korean Air Lines Co., (Nos. 94-5321, 94-5338) . 3

Saavedra v. Korean Air Lines Co., (Nos. 94-55495, 94-55496) 3

Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986) 7

Truehart v. Blandon, 672 F. Supp. 929 (E.D. La. 1987), *rev'd on other grounds*, 884 F.2d 223 (5th Cir. 1989) 7

Zicherman v. Korean Air Lines, 43 F. 3d 18 (2d Cir 1994), *cert. granted*, 115 S. Ct. 1689 (1995) . . . . . *passim*

Treaties and Statutes

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. App. § 1502 (1988) . . . . . *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-933

KOREAN AIR LINES CO., LTD.,

Petitioner,

-v.-

BARBARA SWIFT HOLLIE, as the Personal Representative of and Administratrix of the Estate of FRANCES MAE SWIFT, Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondent, BARBARA SWIFT HOLLIE, respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by Petitioner, Korean Air Lines Co. Ltd., on August 25, 1995.

STATEMENT OF THE CASE

A. Some Background of this Twelve Year Old Case

The air disaster which gave rise to the underlying *Hollie* action took place on September 1, 1983. The next twelve years brought forth what still appears to be interminable litigation.[2]

Until April of 1995, KAL continued to hold up damages trials in all outstanding cases with their motion for a new trial on liability[3]; that motion was denied in the United States District Court for the District of Columbia by Judge Aubrey Robinson on July 1, 1994. KAL appealed Judge Robinson's decision. That appeal was denied on April 6, 1995 by the District of Columbia Circuit, which indicated its disdain for the merits of the appeal by refusing to grant oral argument thereon. *In re Korean Air Lines*

---

[2] A verdict was ultimately returned in August 1989 finding that the air disaster was proximately caused by the "wilful misconduct" of the KAL flight crew. KAL appealed that decision to the District of Columbia Circuit on the issue of liability; the court affirmed the finding of willful misconduct and denied their petition for rehearing. *In Re Korean Airlines Disaster of September 1, 1983*, 932 F.2nd 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 920 (1991). KAL then filed a Petition for Certiorari, which was denied. *Id.*

[3] On December 13, 1993, KAL filed a motion to vacate and set aside the final judgment on the issue of liability and grant a new trial. As a result of the motion, all pending damage cases were retransferred to the United States District Court for the District of Columbia by the Judicial Panel on Multidistrict Litigation ("J.P.M.L."), for a consolidated decision on the motion. Judge Aubrey Robinson denied the motion. *In re Korean Air Lines Disaster of September 1, 1983*, 156 F.R.D. 18 (D.C.C. 1994), *aff'd*, 52 F.3d 1122 (D.C. Cir 1995). KAL appealed. The Court of Appeals for the District of Columbia unanimously affirmed Judge Robinson's decision. *Id.*

Disaster of September 1, 1983, 156 F.R.D. 18 (D.C.C. 1994), *aff'd,* 52 F.3d 1122 (D.C. Cir 1995).

KAL also has appealed each and every damage judgment across the country in New York, Michigan, California and Washington D.C. to their respective Circuit Courts of Appeal. See e.g. *Hollie v. Korean Air Lines Co.*, 60 F.3d 90 (2d Cir. 1994) (cert. filed Aug. 28, 1995); *Bickel v. Korean Air Lines Co.*, (Nos. 93-2144, 93-2206, 93-2259) (6th Cir.); *Jones v. Korean Air Lines Co.*, (Nos. 93-2549) (6th Cir.); *Bowden v. Korean Air Lines Co.*, (Nos. 94-1096, 94-1098) (6th Cir.); *James v. Korean Air Lines Co.*, (Nos. 94-1095) (6th Cir.); *Jones v. Korean Air Lines Co.*, (Nos. 94-110, 94-1101) (6th Cir.); *Kole v. Korean Air Lines Co.*, (Nos. 95-1517) (9th Cir.); *Oldham v. Korean Air Lines Co.*, (Nos. 94-5321, 94-5338) (D.C. Cir.); *Saavedra v. Korean Air Lines Co.*, (Nos. 94-55495, 94-55496) (9th Cir.) *Ocampo v. Korean Air Lines Co.*, (Nos. 94-5323, 94-5424) (D.C. Cir.); *Maikovich v. Korean Air Lines Co.*, (No. 94-5371) (D.C. Cir.).

As is apparent from the fact that they appealed *Hollie*, the practice of KAL is to appeal every case regardless of whether the judgment included loss of society or not.[4]

Finally, in the two cases where the Circuit Court of Appeals rendered its decisions, KAL has sought *certiorari* before the United States Supreme Court. *Hollie v. Korean Air Lines Co.*, 60 F.3d 90 (2d Cir. 1994) (cert. filed Aug. 28, 1995); *Zicherman v. Korean Air Lines,* 43 F. 3d 18 (2d Cir 1994), *cert. granted,* 115 S. Ct. 1689 (1995).

---

[4] Since the trial court Magistrate Judge Buchwald dismissed all loss of society claims, KAL's appeal to the Circuit Court was exclusively on loss of support and pain and suffering. Respondent, Hollie cross appealed on the trial court's dismissal of loss of society. *Hollie v. Korean Air Lines Co.*, 60 F.3d 90, 91 (2d Cir. 1994).

B. Statement of the Damage Case

On June 15, 1993, a jury trial on damages in the instant case, *Hollie*, commenced in the Southern District of New York. KAL made a pre-trial motion to dismiss the plaintiff's claims for loss of society; Magistrate Naomi Buchwald granted KAL's motion. Following the jury verdict, in favor of Respondent, Hollie, the District Court entered a final judgment on loss of support and pain and suffering in the amount of $552,216.00.[5] KAL then appealed the damage award and Hollie cross-appealed challenging the District Court's pre-trial ruling dismissing claims for loss of society.

The Second Circuit Court of Appeals: (1) completely affirmed the District Court's final judgment on damages in the amount of $552,216.00, and (2) reversed the trial court's dismissal of claims for loss of society and remanded the case for trial, limited to the issue of loss of society damages. *Hollie v. Korean Air Lines Co.*, 60 F.3d 90, 95 (2d Cir. 1994).

1. Application for Certiorari to this Court

Thereafter, on August 25, 1995, KAL filed the instant Petition for a Writ of Certiorari which seeks review of the identical question which this Court already granted review on April 17, 1995, in *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir 1994), *cert. granted*, 115 S. Ct. 1689 (1995). The question

---

[5] It is important to note that the jury found that the claimants were financially dependent upon the decedent, *Hollie v. Korean Air Lines Co.*, 60 F.3d 90, 93 (2d Cir. 1994); that finding was not challenged by KAL in their post-trial motion or on appeal to the Second Circuit Court of Appeals. Id. Therefore, the claimants herein have undeniably established the predicate dependency in order to justify an award of loss of society damages. See *Zicherman v. Korean Air Lines*, 43 F. 3d 18 (2d Cir 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

presented in both petitions is: "Whether, pursuant to the general maritime law principles of *Gaudet*, and in light of *Higginbotham* and *Miles*, non-pecuniary damages for loss of society are recoverable for a death occurring on the high seas within the meaning of DOHSA during the course of international air transportation within the meaning of the Warsaw Convention?" Petition at i (footnotes omitted).

2. KAL's Refusal, After Twelve Years, to Pay the Undisputed $552,216.00 Final Judgment

Just to give this court an idea of the dilatory tactics of KAL throughout this litigation, after twelve years of litigation KAL continues in their refusal to pay the $552,216.00 final judgment affirmed by the Second Circuit even though it is absolutely clear the money is owed; KAL has exhausted their appeals and admits that the aforesaid award is now "undisputed."[6]

---

[6] On July 14, 1995, KAL filed a Motion to Stay the Issuance of Mandate Pending the Filing of a Petition for Writ of Certiorari. The Second Circuit granted the motion which: (1) stayed the payment of the $552,216.00 final judgment by the defendant, and (2) stayed the remand of the case on the issue of loss of society damages.

After it was clear that KAL was not seeking review of the $552,216.00 judgment, Respondent, Hollie, moved for Modification of Stay of Issuance of the Mandate, so as to remove the stay on the $552,216.00 judgment; that motion is pending.

REASONS FOR DENYING THE WRIT

I

GRANTING ANOTHER WRIT IN LIGHT OF *ZICHERMAN*, WOULD BE A POINTLESS WASTE OF COURT TIME AND AN UNNECESSARY FURTHER DELAY IN THIS TWELVE YEAR OLD CASE WHICH, IN ANY EVENT, IS BOUND BY *ZICHERMAN*

Korean Air Lines ("KAL") has already been afforded the opportunity to fully brief each and every point it has set forth in its Petition. Throughout their Petition for a Writ of Certiorari, KAL concedes that:

> "[t]he question presented for review is identical to the question as to which the Court granted review on April 17, 1995 in *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir 1994), *cert. granted*, 115 S. Ct. 1689 (1995)."[7] Petition at i (emphasis added).

It is uncontroverted that KAL is the very same defendant that filed both the *Zicherman* Petition, which involves another passenger on KAL flight KE 007, and the instant Petition. Both Petitions seek to eliminate loss of society as a recoverable element of damages in

---

[7] On April 17, 1995 the Court granted KAL's Cross-Petition for a Writ of Certiorari in *Zicherman v. Korean Air Lines*, 43 F.3d 18 (2d Cir. 1940), *cert. granted*, 115 S. Ct. 1689 (1995) (No. 94-1477) to review the same question presented by the petition in the instant case. In the instant Petition for a Writ of Certiorari, Petitioner concedes that: "Currently pending before the court is another case involving the precise issue presented for review in this case." (Petition at 7). The *Zicherman* case has been fully briefed and is scheduled for oral argument on November 7, 1995.

these Korean Air Lines cases.[8] KAL has already been afforded the opportunity to fully brief the question in *Zicherman* and is currently awaiting oral argument in *Zicherman*, which is scheduled for November 7, 1995. The instant Petition, therefore, appears to be the vehicle by which KAL seeks to obtain another "bite at the apple" to brief the "identical" question which is currently pending before the Court in *Zicherman*.

The only one who has a genuine right to be heard on the question presented herein is the Respondent, Hollie. Respondent, who is now desperate to bring her case to a conclusion, would rather forgo her opportunity to be heard and live by the *Zicherman*

---

[8] For Second Circuit cases holding that loss of society damages are recoverable in wrongful death actions arising under the Warsaw Convention, see *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, 829 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (*"Lockerbie II"*); *Hollie v. Korean Air Lines Co.*, 60 F.3d 90, 92 (2d Cir. 1994); *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 21-22 (2d Cir. 1994), *cert. granted*, 115 S. Ct. 1689 (1995).

Other courts have followed the Second Circuit on the recoverability of loss of society damages: *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475, 1486-87 (D.C. Cir 1991) (Warsaw Convention permits recovery for both pecuniary and non-pecuniary damages); *Bowden v. Korean Airlines Co.*, 814 F. Supp. 592, 596 (E.D. Mich. 1993) (Warsaw Convention "supersedes" DOHSA); *In re Patton-Tully Transp. Co. v. Ratliff*, 797 F.2d 206, 212 (5th Cir. 1986) (loss of society is recoverable under general maritime law).

In *Lockerbie II* and *Zicherman*, the Second Circuit followed the line of cases which permits dependents to recover, as well as spouses, for loss of society. *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (*"Lockerbie II"*) citing *Miles v. Melrose*, 882 F.2d 976 (5th Cir. 1989) *aff'd* 498 U.S. 19 (1990); *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); *Anderson v. Whittaker Corp.*, 692 F. Supp. 764 (W.D. Mich. 1988), *aff'd in part*, 894 F.2d 804 (6th Cir. 1990); *Truehart v. Blandon*, 672 F. Supp. 929 (E.D. La. 1987), *rev'd on other grounds*, 884 F.2d 223 (5th Cir. 1989).

decision of this Court. In any event, both sides will be bound by the *Zicherman* decision, whatever that decision may be.

In summary, this Court should deny the Petition for a Writ of Certiorari because: (1) the Petition is an unnecessary duplication of the appeal pending in the *Zicherman* case, and (2) because it will impose further delay in this case, beyond the twelve year delay already incurred, and (3) both parties will, in any event, be bound by this Court's decision in *Zicherman.*

II

RECOVERY FOR LOSS OF SOCIETY IS AVAILABLE IN WRONGFUL DEATH ACTIONS ARISING UNDER THE WARSAW CONVENTION

On the merits of the petition, we respectfully submit that loss of society damages should be available in wrongful death actions arising under the Warsaw Convention.

As previously outlined above, we agree with Petitioner that the identical question presented in the instant Petition is now before the court in *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18 (2d Cir 1994), *cert. granted*, 115 S. Ct. 1689 (1995). The merits of our position on the question presented have been extensively set forth in the *Zicherman* briefs and the *amici curiae* brief submitted on behalf of Philomena Dooley, which are both presently before this Court.

In light of the above, there is no reason to address the merits of the Petitioner's legal arguments herein. Since the rules of the Court require brevity, rather than repeat the substance of those arguments, for the purposes of this brief we rely on and incorporate by reference the arguments set forth in the aforesaid briefs.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Dated: September 22, 1995

Respectfully submitted,

AARON J. BRODER
F. LEE BAILEY & AARON J. BRODER
350 Fifth Avenue, Suite 4710
New York, New York 10118
(212) 244-2000

Counsel for Respondent

Of Counsel:

PAUL S. ZILBERFEIN